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No. 86-223

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT NEAPOLITAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted of conspiracy to violate 18 U.S.C. 1962(c) without agreeing that he would personally commit two predicate offenses.

2. Whether the evidence of a "pattern" of racketeering activity through which petitioner conspired to conduct the RICO enterprise was sufficient to support the RICO conspiracy conviction.

3. Whether the court of appeals' finding of sufficient evidence to support the RICO conspiracy conviction should be reversed because the court relied on (a) evidence of criminal activity not charged in the indictment but admitted to show petitioner's intent and connection to the enterprise, (b) statements of co-conspirators, and (c) evidence of petitioner's participation with his co-conspirators in one predicate offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 791 F.2d 489.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 32-33) was entered on May 16, 1986. A petition for rehearing was denied on June 11, 1986 (Pet. App. 34). The petition for a writ of certiorari was filed on August 11, 1986 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The court of appeals consolidated petitioner's appeal with the appeals of six defendants in an unrelated criminal prosecution. Four of those defendants have filed petitions for writs of certiorari, Nos. 86-48, 86-5114, 86-5120, and 86-5277. Those petitions are currently pending before this Court.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to violate the RICO statute, in violation of 18 U.S.C. 1962(d), and was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. 1-31).

1. The evidence at trial, as summarized in the opinion below (Pet. App. 3-4) and set out in detail in the government's brief in the court of appeals (U.S. Br. 4-15), showed that between May 1982 and February 1983 petitioner and his co-conspirators, Robert Cadieux and Ronald Sapit, all of whom were investigators for the Cook County Sheriff's Department, participated in a "chop shop" operation with local car thieves. Cadieux and Sapit, who initiated the arrangement, solicited both cars and money from the thieves in exchange for protecting the operation from police interference. They worked primarily with car thief Bradley Barton, who was acting as a government informant. Cadieux's and Sapit's activities, alleged in the indictment and proved at trial, included numerous acts of mail fraud and bribery. Petitioner's involvement with the protection arrangement began shortly after it was established (Pet. App. 3-4).

The trial evidence regarding petitioner centers on a meeting that took place on October 18, 1982, but the evidence shows that petitioner was involved in the protection scheme both before and after that meeting. In early summer 1982, Cadieux and Sapit asked Barton to work with another car thief, Herman Dudley. Cadieux, Sapit, and petitioner had arrested Dudley, and Cadieux and Sapit told Barton that Dudley needed to raise $2,000 to "take care of" them and petitioner (U.S. C.A. Br. 6). Later in the summer, petitioner arrested Michael Hardison, an associate of Barton, causing Barton to complain that he had almost been arrested at the same time. Soon thereafter, Sapit and Cadieux suggested

that Barton pay $2,000 for protection from petitioner (*id.* at 7). In October 1982, petitioner solicited from Barton a similar $2,000 bribe, in exchange for which petitioner would agree to leave Barton alone (*ibid.*). On October 18, petitioner met with Barton, Sapit, and Cadieux to discuss the arrangement. Barton recorded the meeting.

The transcript of the conversation at the meeting (GX 13A) reveals petitioner's detailed knowledge of the auto theft operation and its principal participants. In the meeting, petitioner offered to "get rid of" Barton's competition; he suggested that Barton kill his chief rival; and he discussed "fixing" Michael Hardison's case. Petitioner also stated that, if Barton paid him the $2,000 bribe, he would ignore Barton's chop shop operation and notify him of any upcoming police investigation. At the same time, petitioner warned Barton to keep quiet about their deal. Barton then paid petitioner the $2,000 bribe. Barton also paid Cadieux $2,000 in connection with a previously arranged protection bribe. After paying the bribes, Barton asked petitioner's help in removing a stolen car from a garage that was under surveillance by the Cicero police. Petitioner agreed, and on October 25, petitioner had the car towed away. U.S. C.A. Br. 7-12.

The trial evidence showed petitioner's involvement in the overall conspiracy in several other ways as well. For example, in September 1982, Sapit asked Barton to steal a car to supply parts for the car driven by petitioner's wife (U.S. C.A. Br. 7). Also, in the three months following October 1982, Barton and petitioner repeatedly discussed the bribes that would be required to "fix" Michael Hardison's case (*id.* at 12-13). In addition, petitioner participated with his co-conspirators in an attempt to supply a false "clean" title and vehicle identification number for a stolen pickup truck (*id.* at 14-15). Finally, petitioner participated with his co-conspirators in an attempt to supply a new rear half, from a stolen car, for a 1980 Cadillac Eldorado (*id.* at 13-14).

2. Petitioner and his co-conspirators were indicted for RICO conspiracy and mail fraud. The RICO conspiracy count, which charged a conspiracy to conduct the affairs of the sheriff's office through a pattern of racketeering activity, identified the mail fraud charges and numerous acts of bribery as predicate acts. Cadieux and Sapit each pleaded guilty to the conspiracy charge and to one count of mail fraud. Petitioner went to trial.

At the close of the government's case, the district court acquitted petitioner on the four counts of mail fraud with which he was charged. As a consequence, from among the predicate crimes charged in the RICO conspiracy count, the October 18 bribe was the only one that petitioner was alleged to have committed himself, although numerous other predicate acts of petitioner's co-conspirators remained. Petitioner was convicted of RICO conspiracy.

On appeal, petitioner contended that there was insufficient evidence to support the conviction. The court of appeals disagreed (Pet. App. 1-22). The court first rejected the argument that conviction of RICO conspiracy requires proof that the defendant agreed to commit two predicate acts of racketeering himself (*id.* at 6-18). The court next agreed with petitioner that criminal acts that were not specified in the indictment could not serve as predicate acts for purposes of RICO (*id.* at 18-21). Nevertheless, the court of appeals concluded that there was sufficient evidence that petitioner agreed with his co-conspirators to conduct the affairs of the sheriff's office through the commission of at least two of the predicate crimes listed in the indictment (*id.* at 21-22).

ARGUMENT

1. Petitioner first contends (Pet. 10-11) that the decision of the court below, allowing conviction of RICO conspiracy without proof that the defendant agreed to commit two

predicate acts of racketeering himself, is in conflict with the decisions of other circuits. The same issue has been raised in *Messino* v. *United States*, No. 86-48; *Hlavach* v. *United States*, No. 86-5114; *Covello* v. *United States*, No. 86-5120; and *Turner* v. *United States*, No. 86-5277. For the reasons set forth in our consolidated opposition to those petitions, further review of the court of appeals' ruling on this issue is not warranted.[2]

2. Petitioner also contends (Pet. 11-13) that the only predicate acts proved by the government were the two bribes—one to petitioner and one to co-conspirator Cadieux—that Barton paid at the October 18 meeting. Petitioner argues that the court of appeals concluded that this single episode constituted a "pattern of racketeering activity" and that this conclusion is inconsistent with the Court's suggestion in *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 16 n.14 (emphasis omitted), that "continuity plus relationship" is needed to establish a "pattern." This argument misstates the court of appeals' holding and incorrectly suggests that the holding conflicts with *Sedima*.

First, contrary to petitioner's assertion, the court of appeals did not conclude that only the two bribes were proved as predicate acts (Pet. App. 21-22). Rather, the court concluded that the predicate acts were not limited to acts committed by petitioner himself but could include the numerous acts of petitioner's co-conspirators that were listed in the indictment; and the court held that the evidence of petitioner's agreement to the commission of "at least two" of those acts was sufficient to support the conviction (*ibid.*). Moreover, as we have shown, the evidence at trial established precisely the kind of continuity and relationship that the Court suggested in *Sedima* might be required.

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[2]We are sending petitioner a copy of our consolidated response to the petitions in *Messino*, *Hlavach*, *Covello*, and *Turner*.

Reviewing the evidence, the court of appeals concluded (Pet. App. 21-22):

> [S]ubstantial circumstantial evidence * * * taken as a whole supports an inference that [petitioner] agreed to conduct the affairs of the sheriff's office through a pattern of racketeering activity and, more specifically, that he agreed to the commission of at least two of the predicate crimes listed in the indictment. First, statements were made by his alleged co-conspirators * * * to a government informant that identified [petitioner] as having been involved with the corruption in the sheriff's office arising out of the auto theft operation. Second, at the time [petitioner] received the bribe specified in the indictment, he made numerous statements, all of which were recorded, indicating that he was associated with others rather than working on his own. Third, while [petitioner] was taking his bribe, Officer Cadieux was also present to receive a payoff * * *. Fourth, the evidence of other crimes, while irrelevant for purposes of establishing predicate acts, is evidence of [petitioner's] link to the other officers because all these alleged crimes involved all three officers. At a minimum, this evidence establishes that Cadieux's presence at [petitioner's] bribe was not coincidence but part of an on-going relationship.

Thus, the court below did not rest its affirmance on what petitioner suggests is isolated or limited contact with the conspiracy. Finally, nothing in *Sedima* suggests that the government, in a criminal RICO conspiracy prosecution, may not establish the statutorily required "pattern" by proving multiple criminal acts, like the two October 18 bribery payments, that are related to each other and that convey a " 'threat of continuing [criminal] activity' " (*Sedima*, slip op. 16 n.14, quoting S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969)).

3. Petitioner further contends (Pet. i, 13-15) that the court below erred in three respects in finding the evidence sufficient to uphold his conviction. In particular, he alleges that the court of appeals erred by relying on (a) uncharged criminal conduct, (b) the statements of co-conspirators, and (c) petitioner's participation with RICO co-conspirators in one predicate act of racketeering.

a. The government proved three uncharged criminal acts by petitioner: solicitation of a $2,000 bribe from Barton to fix the case of Michael Hardison; involvement with Sapit and Cadieux in an illegal transfer of a clean title and vehicle identification number from an inexpensive, wrecked pickup truck to another stolen pickup truck in better condition; and participation with Sapit and Cadieux in an illegal transaction involving a 1980 Cadillac Eldorado. In addition to proof of these uncharged acts, the government's evidence included petitioner's own incriminatory statements and repeated statements by co-conspirators implicating petitioner in numerous charged aspects of the "chop shop" and protection arrangement, including the solicitation of a cash bribe from Barton and an effort to arrange the theft of a Buick Regal to obtain replacement parts for a car driven by petitioner's wife. The evidence also showed co-conspirator Cadieux's presence at petitioner's receipt of a bribe, Cadieux's role in arranging the payoff meeting, and petitioner's link to his two fellow officers.

The only question raised in and decided by the court of appeals was whether there was sufficient evidence to support the conviction. Even without the evidence of uncharged criminal conduct, and even without the co-conspirators' statements, the evidence was sufficient to support the conviction. Petitioner's own statements, together with his presence during Cadieux's receipt of a bribe, are a sufficient basis for a jury to conclude that petitioner agreed to the RICO conspiracy.

In any event, the court of appeals cited the evidence of uncharged criminal conduct as "evidence of [petitioner's] link to the other officers," not as evidence establishing predicate acts (Pet. App. 22). The evidence was probative of the link to the co-conspirators and was therefore admissible under Fed. R. Evid. 404(b) unless its probative value was outweighed by its prejudicial impact. *United States* v. *Gordon*, 780 F.2d 1165, 1173-1174 (5th Cir. 1986); *United States* v. *Mascio*, 774 F.2d 219, 223 (7th Cir. 1985). Contrary to petitioner's suggestion, there is no additional requirement of proof of conspiracy by independent evidence, and petitioner cites no authority for such a requirement. Rather, the task of balancing the probative value of the evidence against its prejudicial effect is committed to the sound discretion of the district court. The district court's decision to admit the evidence to show knowledge, intent, and participation in the overall conspiracy was not an abuse of discretion.

b. The co-conspirators' statements introduced at trial fully satisfied the requirements of Fed. R. Evid. 801(d)(2)(E). Contrary to the implication of petitioner's argument, the trial evidence—including petitioner's own recorded statements to Barton—amply established his participation in the charged RICO conspiracy. The government thus proved petitioner's connection to the RICO conspiracy independently of the challenged co-conspirators' statements.

c. Finally, petitioner is incorrect in arguing that the court of appeals inferred his agreement to the commission of two racketeering acts solely from his association with co-conspirators Sapit and Cadieux in one predicate act. The court of appeals cited a variety of evidence, not simply petitioner's association with his co-conspirators, in finding the evidence of guilt sufficient (Pet. App. 21-22). Moreover, as we have noted, the evidence established that petitioner

agreed to the commission of more than one predicate act in association with Cadieux and Sapit. In contrast to *Ingram* v. *United States*, 360 U.S. 672, 677-681 (1959), and *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943), petitioner's relationship with his co-conspirators was not innocent or without knowledge of their criminal conduct. Rather, it was clear from the evidence at trial that petitioner knowingly associated with his co-conspirators in their criminal activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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